IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.1621 OF 2005

IN

SUIT NO.1432 OF 2005

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K. Reheja Universal Pvt.Ltd. ...Plaintiff

v/s.

Ms.Zubeida Adamji Heptulla
and ors. ...Defendants

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Mr.P.K. Samdhani i/b B.R.Jhaveri for the Plaintiff.

Mr.A.Y.Sakhare with Mr.Rajeev Kumar, Mr.D.H.Mehta, and Mr.Vibhav Krishnan i/b Divya Shah & Associates for the Defendants.

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CORAM: D.K.DESHMUKH, J.

DATED: 9TH NOVEMBER,2006

P.C.:

1. This Notice of Motion is taken out by the Plaintiff. The Plaintiff has filed the suit for decree of specific performance of the agreement of sale of the property which admittedly belongs to Defendants Nos. 1 to 5. According to the Plaintiff, the Defendants agreed to sell their property which is described in the document at Exh.F for consideration of Rs.23,75,00,000/-. Out of the agreed consideration Rs.20 lakh was paid on the same day and further an amount of Rs.41 lakh was paid on various dates till 25th May, 2004. Thereafter, the Defendants also signed the power of attorney in favour of the Plaintiff, so that the Plaintiff could obtain sanction for demarcation of the property from various departments. According to the Plaintiff, however, subsequently the Defendants Nos. 1 & 2 resciled from the agreement and therefore to avoid

any dispute the Plaintiff again entered into negotiation with the Defendants. During the course of negotiations, without prejudice to rights and contentions of the Plaintiff that there is a concluded agreement contained in the document at Exh.F., the parties exchanged Memorandum of Understanding to be executed between the parties. But ultimately no fresh agreement came into effect between the parties as the negotiations failed and therefore the Plaintiff has filed this suit.

2. The learned Counsel appearing for the Plaintiff submits that the document at Exh.F makes it absolutely clear that the agreed price of the property was Rs.23,75,00,000/-. The property was to be transferred free from all encumbrances and vacant possession of the property was to be given. The learned Counsel submits that after the document at Exh.F was signed by all the five Defendants, various amounts were paid to the Defendants by the Plaintiff on various dates from 11th May, 2004 to 25th May, 2004 and the Defendants acknowledged receipt of the amounts, in each of the receipts which are at Exh.H-1 to H-5. The learned Counsel appearing for the Plaintiff submits that the fact that the Defendants

signed the power of attorney in favour of the Plaintiffs also indicates that the Defendants have entered into the agreement to sell the property. The learned Counsel submits that neither in the correspondence exchanged between the parties nor in the affidavit in reply filed in this court the Defendants any where explain as to how and why if there was no concluded agreement between the parties, they signed the document at Exh.F. The learned Counsel further submits that by letter dated 29th July, 2004 the Defendants Nos. 1 and 2 informed the Plaintiff that they were negotiating with the Plaintiff regarding sale of their share in the property i.e. Plot "C" only and they have narrated their version of the negotiation. The learned Counsel submits that the Defendants Nos. 4 to 5 addressed the notice dated 15th September, 2004 where they have said that they are negotiating with the Plaintiff for sale of their shares in Plot B and C and they agreed to transfer their shares in Plot B to the Plaintiff on being paid Rs.4.75 crores each. There are five sharers in the property. The learned Counsel further submits that after having entered into the agreement with the Plaintiff and after having received the substantial amount, the

Defendants Nos. 1 & 2 started having second thoughts and they were not ready to execute the sale deed in favour of the Plaintiff and therefore to avoid the dispute the Plaintiff entered into the negotiations with the Defendants again without prejudice to their contentions that there is a concluded agreement between the parties. But even those negotiations did not result in settlement. Therefore the Plaintiff has filed the present suit.

3. The learned Counsel for the Plaintiff submits that the Plaintiff is willing to furnish a bank guarantee of the balance amount of consideration. According to the learned Counsel, if an interim order restraining the Defendants from creating third party rights in the property is not passed, then irreparable loss would be caused to the Plaintiff.

4. According to the Defendants, on the other hand, there is no agreement to sell arrived at between the parties, but the parties were merely carrying on negotiations. The Defendants, in their affidavit in reply have narrated as to what were the terms discussed between the parties. According to the Defendants the fact that a power of attorney in

favour of the Plaintiff only for limited purpose was signed by the Defendants would show that there was no agreement arrived at between the parties. According to the Defendants, had the parties arrived at an agreement before the power of attorney had been signed, all powers would have been given to the Plaintiff. Defendants relied on correspondence exchanged between the parties including the draft of the Memorandum of Understanding exchanged between the parties to contend that there was no concluded agreement arrived at between the parties. It is submitted that the amount of Rs.23.75 crores for all the five sharers cannot be taken as agreed consideration. According to the Defendants there is a bunglow standing on the property which is occupied by the Defendants Nos. 1 & 2, therefore, Defendants Nos. 1 & 2 would be entitled to more consideration than the other sharers in the property. According to the Defendants, therefore, the Defendants Nos. 1 & 2 were demanding flats being given to them in the new construction that was to come up on the property and alternate accommodation had also to be given to the Defendants Nos. 1 & 2. It is submitted that the document at Exh.F cannot be said to contain all the necessary terms of an agreement to sell the property.

In the submission of the Defendants, therefore, as grant of decree of specific performance of a contract is in the discretion of the court, it is unlikely that the court would pass a decree of specific performance of the contract in this suit.

5. Now, after having heard the learned Counsel appearing for both sides at length and after having gone through the record, I find that the most important document is the document at Exh.F. Relevant portion of that document reads as under:-

> Re:Property admeasuring 3303.5 sq. meters, being a part (50%) of larger property bearing C.T.S. Nos.H/501, H/502 and H/503 of Revenue Village Bandra (W), situate at Hasnabad Lane, Santacruz (W), Mumbai 400 054, which is demarcated and segregated on site as shown on the plan annexed hereto by red outline and marked as Plots B & C thereon, belonging to us in pursuance of the Consent Decree dated 10/1/2004 passed in Bombay High Court Suit No.825 of 1993.
>
> RECEIVED from K. Reheja Universal Pvt.Ltd.

having their registered office at Construction House, 'B', 1st Floor, Opp.Khar Telephone Exchange, Linking Road, Khar (W), Mumbai 400 052, an aggregate amount of Rs.25,00,000/- (Rupees Twenty five lacs only) by five cheques for Rs.5,00,000/- (Rupees five lacs only) each, drawn in favour of each of us, all dated 28th April, 2004 drawn on the Jammu & Kashmir Bank Ltd., Bandra (W), Mumbai bearing Nos.026916 to 026919 and 026921 respectively, in respect of the captioned property, which we have agreed to sell to K.Raheja Universal Pvt.Ltd. for the total consideration of Rs.23,75,00,000/- (Rupees Twenty Three Crores Seventy Five lacs only) with a clear freehold marketable title, (including clearance under the ULC & R Act, 1976), free from all encumbrances and with vacant possession.

Dated this 28th day of April 2004.

6. Perusal of the above quoted portion shows that the property that is subject matter of the agreement is clearly defined in this agreement. In any case, sufficient particulars of the property are given

which would be enough to identify the property. Agreed amount of consideration is specifically mentioned. The fact that part of the amount is paid is also mentioned and that the Defendants have agreed to convey clear title to the Defendants with vacant possession is also mentioned. Therefore, all the necessary ingredients of an agreement to sell are to be found in the document. The Defendants no where deny that they have signed this document. Though the learned Counsel appearing for the Defendants took me through correspondence exchanged between the parties as well as the detailed affidavit in reply filed by the Defendants, he could not point out to me any explanation given by the Defendants as to why if there was no final agreement arrived at between the parties, they signed the document at Exh.F. In my opinion, the first thing the Defendants had to do was to explain, if according to them concluded agreement between the parties was not arrived at, why in the document at Exh.F they have stated that they have agreed to sell the property to the Plaintiff for the consideration of Rs.23.75 crores. The document at Exh.F also does not stand alone. In each of the receipt at Exh.H-1 to H-5 the document dated 20th April, 2004 at Exh.F is clearly referred to and it is

also mentioned that this payment is being made, receipt of which being acknowledged, pursuant to that agreement. In my opinion, therefore, it was absolutely necessary for the Defendants to explain the circumstances and the reasons why they signed not only the document at Exh.F, but also the documents at Exh.H-1 to H-5. It is true that from the conduct of the Defendants of signing the power of attorney in favour of the Plaintiff only for limited purpose, more than one inference is possible to be drawn. But in my opinion, the inference that the Defendants want to be drawn from the power of attorney is not a possible inference. It cannot be believed that merely because negotiations were going on between the parties the Defendants will execute the power of attorney in favour of the Plaintiff. It is pertinent to note that by the power of attorney apart from other things the Defendants have authorised the Plaintiff to carry on litigation in relation to the property on behalf of the Defendants. In my opinion, nobody would authorise a person with whom merely negotiations are going on to carry on litigation on behalf of that persons. Because carrying on litigations requires the person to take a definite stand in relation to the property and rights. In my

opinion, proper and possible inference that can be drawn from the power of attorney is that because the negotiations between the parties came to an end and an agreement to transfer the property was arrived at, that the power of attorney was executed in favour of the prospective purchaser. One more aspect, in my opinion, that requires to be considered is that the document at Exh.F shows that negotiations were being carried on by all the Defendants for transfer of both the plots B & C. Perusal of the letter dated 29th July, 2004 from Defendants Nos. 1 to 2 shows that they were carrying on negotiations only in relation to their shares in the property. Whereas the letter dated 15th September, 2004 from Defendants Nos. 3 and 4 shows that they were carrying on negotiations with the Plaintiff in relation to their Plot-B. What is significant is that by the letter dated 15th September, 2004 Defendants Nos. 3 & 4 clearly indicated that there was a concluded transaction between the parties and that they were only to receive Rs.4.75 crore each for their share in the property. The correspondence on record shows that even the subsequent negotiations between the parties were in relation to shares of Defendants Nos. 1 & 2, Plots B & C are undivided, Defendants Nos. 3 & 4

appear to have agreed that there was a concluded contract between the parties and their share of consideration is also agreed. In this situation as the Plaintiff has agreed to furnish the bank guarantee, in my opinion, there is definitely a case made out for preservation of the shares of the Defendants Nos. 4 & 5. As the property is undivided, merely shares of Defendants Nos. 4 & 5 cannot be separately marked and preserved. Therefore, temporary injunction in relation to the entire suit property will have to be made. The learned Counsel appearing for the Defendants took me through the correspondence between the parties after the document at Exh.F including the above referred draft memorandum of understanding to contend that there was no concluded contract between the parties. But perusal of the letter dated 31st December, 2004 shows that the Plaintiff in no uncertain terms stated that the negotiations were being carried out without prejudice to the contentions of the Plaintiff that there was a concluded agreement between the parties. In my opinion, therefore, prima facie it cannot be said that merely because the parties were exchanging correspondence the document at Exh.F does not show that there was a concluded agreement between the

parties. It is to be noted that the Defendants are retaining Rs.61 lakh. At no point of time they have offered to the Plaintiff that amount back. At the hearing when I pointed out this to the learned Counsel appearing for the Defendants, he stated that the Defendants are willing to refund that amount. In my opinion, making the offer in the court at this stage can not be said to be bonafide. If according to Defendants there was no concluded agreement between the parties, first thing the Defendants should have done was to return the amount admittedly received by the Defendants.

. One more aspect, in my opinion, that has to be mentioned is when I found from the correspondence between the parties that the Defendants were relying on the memorandum of understanding, which shows Rs.32.25 crores as consideration. I suggested that the Plaintiff should pay the agreed amount of consideration which according to the Plaintiff is payable namely Rs.23.75 crore to the Defendants and the Defendants would execute the sale deed in favour of the Plaintiff. The Plaintiff will deposit the amount of difference between Rs.32.25 crores and Rs.23.75 crores in the court or give a bank

guarantee. I suggested that with this arrangement the parties can go to arbitration and resolve the dispute. The learned Counsel appearing for the Defendants sought time to take instructions and after taking instructions he states that the proposal is not acceptable. In my opinion, the proposal was reasonable, but the Defendants did not accept the same. They also did not indicate any reason for not accepting the proposal. This shows that if suitable interim order is not made then the Defendants may create complication. Notice of Motion is, therefore, granted in terms of prayer clause (b) subject to the condition that within a period of six weeks from today the Plaintiff furnishes the bank guarantee of Rs.23.9 crores of a nationalised bank to the satisfaction of the Prothonotary & Sr.Master. Motion disposed of.

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